No. 96-1985

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

SAMUEL L. NARO and LINDA NARO, husband and wife,

Petitioners,

vs.

HAMILTON TOWNSHIP, HAMILTON TOWNSHIP POLICE DEPARTMENT, DETECTIVE CAPTAIN THOMAS PIZZULLO, JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JOHN DOE V, JOHN DOE VI, JOHN DOE VII, JOHN DOE VIII, JOHN DOE IX, JOHN DOE X (fictitious names meant to represent other police officers involved in the investigation), THE TRENTON TIMES, THE NEWHOUSE PUBLISHING COMPANY, PETER PAGE, RICHARD BILOTTI, THE TRENTONIAN, JOURNAL REGISTER COMPANY, MARK A. WALIGORE, PAUL MICKLE, H.L. SCHWARTZ, III, RON ROE I, RON ROE II, RON ROE III, RON ROE IV, RON ROE V, RON ROE VI, RON ROE VII, RON ROE VIII, RON ROE IX, RON ROE X,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION FOR RESPONDENTS *THE TIMES*, PETER PAGE AND RICHARD BILOTTI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent *The Times* states that it is published by The Times of Trenton Publishing Corporation, which is a subsidiary of Oregonian Publishing Company, which is a subsidiary of Advance Publications, Inc.

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Respondents *The Times*, reporter Peter Page and publisher Richard Bilotti ("the newspaper defendants") respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Samuel L. Naro and Linda Naro. The Petition asks this Court to review an unpublished per curiam opinion of the Appellate Division of the New Jersey Superior Court, after the Supreme Court of New Jersey declined to review the case. The opinion affirms summary judgment dismissing a defamation complaint on state law grounds. The Petition presents no issue warranting this Court's review.

RESPONDENTS' OBJECTIONS

Respondents object to Petitioners' Questions Presented and Statement of the Case. A Counter-Statement of the Case is set forth below and the questions presented by the Petition are set forth under Reasons for Denying the Writ section hereof.

STATEMENT OF THE CASE

A. Procedural History

The Times published an article on October 25, 1990 indicating that plaintiff Samuel Naro was a "suspect" in an unsolved murder investigation. The article detailed how plaintiff had been arrested for armed robbery, how plaintiff had used a disguise and weapons during the armed robbery similar to the *modus operandi* used in the unsolved murder, and how plaintiff's photograph bore a close resemblance to a composite sketch of the murder suspect. Most important, police officials stated that they viewed plaintiff as a "suspect" in the murder investigation.

After extensive discovery, the newspaper defendants moved for summary judgment. (Pa 32 to 62).[1] On October 6, 1994, the

1. All citations to appendices and briefs are to the appendices and briefs (Cont'd)

Law Division of the New Jersey Superior Court granted summary judgment dismissing all claims against the newspaper defendants. (Pa 397). The Law Division found that the articles were "true" and that plaintiffs' claims failed for lack of a showing of actual malice. The trial court's bench ruling was apparently also based on other state law privileges asserted by the newspaper defendants. (Transcript of October 6, 1994, at 5).

Petitioners appealed to the Appellate Division of the New Jersey Superior Court. On September 4, 1996, the Appellate Division, in an unpublished per curiam opinion, found that Naro was a limited-purpose public figure and, as a result, it was plaintiffs' burden to prove that any defamatory statements by the newspaper defendants were false and that the newspaper defendants either knew they were false or entertained serious doubts about their truth when the statements were published. (Petitioners' Appendix to Petition for Certification at 6-7 (hereinafter referred to as "Pet. App.")). The Appellate Division found that *The Times*' stories concerning Naro were based on statements of police officers and the factual circumstances of the armed robbery in which Naro was involved. (*Id.* at 7). Thus, the Appellate Division ruled that the "Naros failed to establish facts to sustain their burden that the statements were false and made with actual malice." (*Id.*). The Appellate Division further held, as an alternative ground for affirmance of summary judgment, that the newspaper defendants' allegedly defamatory stories "were protected by the fair report privilege," under New Jersey common law. (*Id.* at 8).

On January 6, 1997, the Supreme Court of New Jersey denied the Naros' petition for certification. (Pet. App. at 1). A Petition to this Court followed.

(Cont'd)
filed in the Appellate Division, unless otherwise noted. "Pa" refers to Plaintiffs' Appellate Division Appendix.

B. Statement of Facts

On October 23, 1990, petitioner Samuel Naro, a Trenton, New Jersey firefighter, was arrested and charged with armed robbery, burglary and illegal weapons possession. Naro had struck Andrew Horchak, age 78, in the face, then sprayed the elderly man with mace in the course of a robbery. (DTa 5 to 61).[2] According to police reports and witness statements, Naro used, and was apprehended with, a wig, fake mustache, dark sunglasses, a can of mace, a knife and other paraphernalia. (*Id.*).[3]

The following day, October 25, 1990, *The Times* published an article stating that Naro was "a suspect in the September, 1989 murder of Marjorie Szeker." (DTa 65 to 66). Szeker, a teacher at a local high school, had her throat slashed while unloading her groceries at a supermarket in Hamilton Township, New Jersey, apparently during an aborted robbery. Witnesses told the police that the killer drove a van and provided sufficient details of his description for police to prepare a composite sketch. (*Id.*). The crime had attracted substantial public interest and concern in the Trenton, New Jersey area, where *The Times* is distributed.

The article explained that Naro "bears such a striking resemblance to one of the composite sketches circulated after the killing that his fellow firefighters teased him about it." (*Id.*). Referring to Naro's use of a disguise during the Horchak robbery,

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2. "DTa" refers to the Appendix of Defendants/Respondents *The Times*, Peter Page and Richard Biolotti, which is attached to Defendants/Respondents' Brief filed in the Appellate Division.

3. On October 24, 1990, *The Times* published an article describing the attack and Naro's arrest. (DTa 63). The truth of that article has not been disputed by Naro.

Trenton Detective Captain Joe Golden was quoted in the article as stating that the use of rubber gloves, rope, tape, a knife, a dagger, and disguises indicated careful planning on Naro's part. Captain Golden added: "I don't think this was his (Naro's) first time." (*Id.*). Hamilton Township Detective Captain Thomas Pizzullo was quoted as stating about the Szeker murder investigation: "We are looking at everybody, and as soon as they said he used disguises, that he generally fits the composite and generally fits the height requirement, we got interested." (*Id.*). According to police, Naro had owned another van in 1989 and sold it shortly after the killing of Szeker. (*Id.*).[4]

On September 3, 1991, Naro was indicted on multiple counts of robbery and burglary in connection with his assault on Horchak. (DTa 71 to 84). On March 12, 1993, Naro was adjudged not guilty by reason of temporary insanity. (DTa 86 to 87). Significantly, Naro did not deny committing the acts alleged.

The Complaint in this action was filed on or about October 14, 1991. (DTa 89 to 100). Count One of the Complaint alleges that *The Times*' October 25, 1990 article, which states that Naro "is a suspect in the September, 1989 murder of Marjorie Szeker, Township Police confirmed yesterday," constitutes defamation. The other counts against the newspaper defendants, which allege intentional infliction of emotional distress, invasion of privacy, false light, and loss of consortium on behalf of the wife of Samuel Naro, all arise out of *The Times*' October 25, 1990 article.

Discovery established the truth of the allegedly defamatory statement. As part of its interrogatory answers, Hamilton

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4. The following day, October 26, 1990, *The Times* published a follow-up article in which Naro's attorney denied that his client was involved in the Szeker murder. In the front page story, Naro's attorney called speculation concerning Naro's involvement in the murder a "wild guess." (DTa 68 to 69).

Township produced the Certification of Police Chief Richard L. Taylor. (DTa 127 to 129). Chief Taylor's Certification states unequivocally that based on the circumstances of Naro's arrest, Naro was considered "to be a suspect in the Marjorie Szeker murder." (DTa 127 to 128, at ¶ 4). He further states that he advised Detective Captain Thomas Pizzullo, who was responsible for the Szeker murder investigation, "of the official position of the Hamilton Township Division of Police as to the status of Samuel Naro as a suspect in such investigation." (DTa 128, at ¶ 7). The Police Chief further authorized Pizzullo to communicate this position to *The Times* and Pizzullo did so. (DTa 128, at ¶¶ 7-8). Finally, and significantly, Chief Taylor states that he reviewed *The Times*' October 25, 1990 article about Naro when it was published, and again before he executed his certification, and he believes it "set forth the official statement that [he] made or authorized to be made on [his] behalf as the head of Hamilton Township Division of Police concerning the issue." (DTa 129, at ¶¶ 10-11).

At his deposition, Detective Captain Thomas Pizzullo confirmed Chief Taylor's statements that Naro was a suspect in the Szeker murder investigation when *The Times*' October 25, 1990 article was published. (DTa 132 lines 13-15). Detective Pizzullo further confirmed that, with Chief Taylor's authorization and on Chief Taylor's behalf, Pizzullo communicated this position to *The Times*. (DTa 133 to 135).

Naro's own deposition testimony supported his status as a "suspect." Naro admitted at his deposition that his co-workers saw a resemblance between him and the composite sketch of the Szeker killer. (DTa 118). Naro admitted that he had a van at the time of the Szeker murder; and there was evidence that the Szeker killer drove a van. (DTa 124). Naro admitted that he owned a wig, fake mustache, dark sunglasses, can of mace, knife and other paraphernalia used in the robbery of Horchak. (DTa

119 to 124). Thus, it is clear that Naro was a suspect and with good reason.

REASONS FOR DENYING THE WRIT

Petitioners have not and cannot demonstrate that the New Jersey Appellate Division "decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court." Sup. Ct. Rule 10(c). The Petition asserts only that the New Jersey Appellate Division incorrectly determined that petitioner was a public figure and that he had failed to demonstrate actual malice. Neither issue involves an unsettled area of law or a conflict with other decisions. Petitioners only disagree with the Appellate Division's application of well established rules of law, which is not a basis for certiorari.

In this case, certiorari should be denied for three reasons. First, this Court lacks jurisdiction because there were adequate and independent state grounds for the state court decision. Second, petitioners failed to raise the limited purpose public figure issue below and, even if they had raised the issue, it was properly decided under settled law. Third, the state court properly applied well established rules of law in ruling that petitioners failed to establish actual malice or even demonstrate that the allegedly defamatory article was false. For each of these reasons, this Petition should be denied.

I.

THIS COURT IS WITHOUT JURISDICTION TO GRANT THE PETITION AS THERE WERE ADEQUATE AND INDEPENDENT STATE GROUNDS FOR THE STATE COURT DECISION.

This Court has refused to decide cases where there is "an adequate and independent state ground" out of "[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions." *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). Petitioners, however, are asking this Court to grant review of a state court decision with several adequate and independent state grounds: First, the state court found that plaintiffs' claims were barred by the fair report privilege, which is a state common law doctrine. (Pet. App. at 8). Second, the New Jersey court's application of the actual malice standard, about which petitioners complain, is governed by broad state law rules defining the standard in a manner intended to vindicate the State's broad protection afforded speech and expression. Third, there are other state law grounds justifying the state court decision.

A. The Common Law Fair Report Privilege Was An Independent And Adequate Ground For The State Court's Dismissal Of Petitioners' Claims.

After reciting the fair report privilege, the Appellate Division concluded that "the journalist reports in the *Times* . . . were protected by the fair report privilege." (Pet. App. at 8). The court relied only on the New Jersey Supreme Court's decision in *Costello v. Ocean County Observer*, 136 N.J. 594 (1994) and the RESTATEMENT (SECOND) OF TORTS § 611 in discussing the privilege; no federal law was cited or relied upon. (Pet. App. at 8). Clearly, the fair report privilege was an independent state law ground for dismissal of plaintiffs' case.

Moreover, it was an adequate ground, based on well-established state law derived from the RESTATEMENT (SECOND) OF TORTS, which summarizes the fair report privilege as follows:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported.

RESTATEMENT (SECOND) OF TORTS § 611, at 297 (1977). The commentary to Section 611 of the RESTATEMENT expressly states that the privilege applies to a "charge of crime made by the officer." *Id.* at § 611, comment h.

New Jersey courts have frequently applied the common-law privilege of Section 611 to immunize published reports of written and oral statements of governmental officials from libel claims. *See, e.g., Swede v. Passaic Daily News*, 30 N.J. 320, 331-35 (1959) (dismissing libel claims by police officers arising out of newspaper's publication of remarks made by city manager after city council meeting); *Orso v. Goldberg*, 284 N.J. Super. 446, 451 (App. Div. 1995) (directing summary judgment, under § 611 fair report privilege, dismissing libel claims by police officers arising out of newspaper's publication of remarks by city councilman during a private interview); *Molnar v. Star-Ledger*, 193 N.J. Super. 12, 20 (App. Div. 1984) (affirming summary judgment, under § 611 fair report privilege, dismissing libel suit against newspaper which had reported statements by deputy fire chief).

In *Molnar v. Star-Ledger*, the New Jersey Appellate Division affirmed summary judgment dismissing libel claims against a

newspaper based on the fair report privilege. In doing so, the court classified the oral comments of a Deputy Fire Chief interviewed about a suspicious fire as "official action," protected by the Section 611 fair report privilege. 193 N.J. Super. at 20.

More recently, in *Orso v. Goldberg*, the New Jersey Appellate Division reversed an order denying summary judgment, and remanded the case for entry of summary judgment in favor of a newspaper and reporter that published allegedly defamatory statements about town police officials by a town councilman during a press interview. In directing dismissal of the defamation claims, the court ruled that the fair report privilege extends even to "non-public interviews" with local officials. 284 N.J. Super. at 453.

As the state court ruled in this case, the statements of the Hamilton Township Police interviewed about the progress of an important murder case are also privileged. The allegedly defamatory statement that Naro was a "suspect" was made by a public official in the course of an interview. Thus, regardless of the issue of actual malice,[5] the newspaper defendants are protected by the state fair report privilege. Thus, the fair report privilege provides an independent and adequate state law ground for the state court's decision.

B. The State Law Rules Governing Application Of The Actual Malice Standard Provided An Independent And Adequate Ground For The State Court's Dismissal Of Petitioners' Claims.

In applying the actual malice standard in this case, the state court did not, as it did with the fair report privilege, rely solely

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5. *See Orso v. Goldberg*, 284 N.J. Super. at 455 (suggesting fair report privilege is sufficient to defeat a libel claim even if there is actual malice); RESTATEMENT (SECOND) OF TORTS § 611, comment a (same).

on state court decisions. However, the state law rules governing application of the actual malice standard, which provide broader application of the standard than under federal law, informed the decision. As such, they provide an independent and adequate ground for the state court's dismissal of the case.

The New Jersey Supreme Court has declared: "Precedent, text, structure, and history all compel the conclusion that the New Jersey Constitution's right of free speech is broader than the right against governmental abridgement of speech found in the First Amendment." *New Jersey Coalition v. J.M.B. Realty*, 138 N.J. 326, 353 (1994); *see State v. Schmid*, 84 N.J. 535, 557-60 (1982). New Jersey provides greater protection of free speech, and in turn greater latitude for comments affecting reputational interests, than the First Amendment. The New Jersey Supreme Court provides this protection through a broader application of the actual malice standard than federal law requires. Specifically, the New Jersey Supreme Court, notwithstanding more restrictive views of other state and federal courts, has applied the actual malice standard to cases with certain types of non-public figure plaintiffs, *Sisler v. Gannett Co.*, 104 N.J. 256, 270-79 (1986), and to statements solely on the basis of their reference to matters of legitimate public concern, *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 104 N.J. 125, 139-48 (1986). This Court has no basis to review the New Jersey court's application of the actual malice standard, even if it was applied more broadly than provided in federal decisional law.

C. There Were Additional Independent And Adequate State Grounds For The State Court Decision, Though The State Court Did Not Reach Those Additional Grounds.

Because the state court ruled that the Complaint was barred by the fair report privilege, the truth of the allegedly defamatory article and the absence of actual malice, the state court never

addressed additional state law grounds for its decision. Such grounds, which are discussed below, would make any reversal by this Court under federal law an advisory opinion.

First, even if petitioner was not a limited purpose public figure, as the Appellate Division ruled, petitioner would still be required to prove actual malice under New Jersey's fair comment doctrine. New Jersey's doctrine of fair comment "extends to virtually all matters of legitimate public interest." *Dairy Stores v. Sentinel Pub. Co.*, 104 N.J. at 141.[6] The common law privilege of fair comment extends not only to expressions of "opinion," but likewise to statements of "fact." *Id.* at 148. The New Jersey Supreme Court, in defining a broad privilege of fair comment, has ruled that false statements of fact concerning matters of public concern are privileged from defamation liability unless that privilege is overcome by proof of actual malice. *Id.* at 151.

The fair-comment privilege applies to any alleged false statement of fact reported in *The Times*' article. The status of the investigation of the murder of a popular local teacher while grocery shopping was a matter of legitimate public concern. As such, plaintiff must establish that the newspaper defendants called him a "suspect" with actual malice, whether or not he was a limited purpose public figure. Plaintiff cannot make such a showing; he was a suspect and there is no evidence that the reporter believed plaintiff was not a suspect. Thus, the fair comment privilege protects the newspaper defendants from liability even if plaintiff was not a limited purpose public figure.

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6. *See, e.g., Kotlikoff v. The Community News*, 89 N.J. 62, 65 (1982) (statements about local property tax collection); *Coleman v. Newark Morning Ledger Co.*, 29 N.J. 357, 382-83 (1959) (internal security during McCarthy era); *Hohl v. Mettler*, 62 N.J. Super. 62, 66-67 (App. Div. 1960) (potential drainage, health and fiscal problems from a proposed trailer park); *Mick v. American Dental Ass'n*, 49 N.J. Super. 262, 280, 282-83 (App. Div.), *cert. denied*, 27 N.J. 74 (1958) (fluoridation of drinking water).

Second, *The Times*' allegedly defamatory article is privileged under a New Jersey statute immunizing reports of official police statements. N.J.S.A. 2A:43-l provides:

> The privileged character attaching to the publication of judicial or other proceedings shall extend to the publication in any newspaper of official statements issued by police department heads and county prosecutors in investigations in progress or completed by them, and which are accepted in good faith by the publisher of any newspaper, and the privileged character thereof shall be a good defense to any action for libel, unless malice in fact be shown by the plaintiff therein.

This statute was designed to protect law enforcement officials, and newspapers that publish their official statements, from just the kind of action brought by petitioners in this case.

Under N.J.S.A. 2A:43-l, regardless of whether Naro was a suspect, if law enforcement authorities stated that he was a suspect, newspapers were privileged to print it without fear of liability. Here, Police Chief Taylor made clear that it was his department's official position that Naro was a suspect. (DTa 128 at ¶ 7). That position was communicated to the newspaper defendants and they printed it. Thus, *The Times*' October 25, 1990 article describing Naro as a suspect is privileged under N.J.S.A. 2A:43-1 and cannot provide a basis for a defamation claim regardless of federal law governing the applicability of the actual malice standard.

II.

PETITIONERS FAILED TO RAISE THE PUBLIC FIGURE ISSUE BELOW AND, EVEN IF THEY HAD RAISED THE ISSUE, IT WAS PROPERLY DECIDED UNDER SETTLED LAW.

In both the Law and Appellate Divisions of the New Jersey Superior Court, petitioners acknowledged that in order to survive the motion for summary judgment, they had to establish an issue of fact with respect to whether the newspaper defendants published the statement that Samuel Naro was a "suspect" in the Szeker murder investigation with knowledge that he was not a suspect, or in reckless disregard as to whether or not he was a suspect, *i.e.* actual malice. (Pa 104, Pb 22).[7] Having failed to properly raise the issue in the lower courts, petitioners are not permitted to raise or contest the applicability of the actual malice standard in this Court. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992).

Even if petitioners had raised the actual malice issue below, their Petition would be without merit because the state court properly decided the issue under settled law. In its analysis of whether petitioner Samuel Naro was a limited-purpose public figure, the New Jersey Appellate Division relied on this Court's seminal First Amendment cases, including *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). (Pet. App. at 6). The state court, quoting this Court, identified two categories of public figures to whom the constitutional libel standard of actual malice pertain: (1) "all-purpose" public figures and (2) "limited-purpose public figures." *Id.* at 344-45, 351. A limited-purpose public figure is an individual that "voluntarily injects himself or is drawn into a

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7. "Pb" refers to Plaintiffs' Appellate Division Brief.

particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* (Pet. App. at 6).

The New Jersey court went on to closely adhere to this Court's decision in *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979), recognizing "that a person who engages in criminal conduct does not automatically become a 'public figure.' " *Id.* at 168-69. (Pet. App. at 6). The state court ruled that "public figure status of a criminal defendant, who is the subject of the alleged defamation in a libel case is to be determined no differently than in any other libel case; namely, by focusing on the 'nature and extent of an individual's participation in the controversy giving rise to the alleged defamation.' " *Id.* at 168-69. (Pet. App. at 6).

The state court recited the holding of *Wolston*, and applied it in a manner that gave petitioner the benefit a presumption that he would be treated as any other plaintiff (whether or not a criminal defendant) in determining whether the actual malice standard should apply. The law requires no greater protection for petitioner.

The state court did not find Naro to be a limited purpose public figure because he was a suspect in the Szeker murder, as petitioners suggest. Naro's status as a limited purpose public figure grew out of Naro's actions, which resulted in his arrest for a different crime *before* he was identified as a suspect in the Szeker murder investigation.

Contrary to his assertion, Naro was not thrust into the limelight of the Szeker investigation through no fault of his own. Naro placed himself into the Szeker limelight by committing a criminal act with a *modus operandi* similar to that used to murder Marjorie Szeker. If plaintiff had not donned a disguise and brutally beaten and attempted to rob Andrew Horchak, plaintiff

would not have attracted the suspicion of the Hamilton Township Police Department. Thus, plaintiff cannot be heard to complain that he involuntarily became a limited-purpose public figure.

It is true that, under *Wolston*, a person who engages in criminal conduct does not "automatically" become a public figure. The state court recognized this principle of law. (Pet. App. at 6). It does not follow, however, that such a person is necessarily not a public figure. Often, those who engage in criminal conduct are public figures. In *Wolston*, the plaintiff was found not to have lost his private status when he was unable to respond to a subpoena because of health problems. *Id.* at 168-69. Here, the conduct at issue was much more culpable.[8]

The state court accurately set forth this Court's rules of law in limited-purpose public figure jurisprudence. The state court also applied those rules of law correctly. Even if it had misapplied the law, as petitioners contend, however, that is not a basis for granting the Petition. Sup. Ct. Rule 10.

III.

THE STATE COURT PROPERLY RULED THAT PETITIONERS FAILED TO DEMONSTRATE ACTUAL MALICE.

Petitioners contend that they demonstrated actual malice. They are mistaken. The New Jersey courts correctly set forth and applied the actual malice standard. (Pet. App. at 7).

In order to meet the "actual malice" test, as the state court

8. Moreover, even if Naro was not a limited-purpose public figure, such that he triggered application of the actual malice standard, he was a firefighter employed by the City of Trenton. As a public official, he would be subject to the same actual malice standard in New Jersey. *See Costello v. Ocean County Observer*, 136 N.J. at 613.

recognized, "a public figure [or public official] must prove with convincing clarity that the defamatory statements were published by the defendant with knowledge of their falsity or reckless disregard of whether they were true or false." *Lawrence v. Bauer Publishing & Printing Ltd.*, 89 N.J. 451, 466, *cert. denied*, 459 U.S. 999 (1982), *applying New York Times v. Sullivan*, 376 U.S. at 279-80. Libel defendants have not acted with "reckless disregard" under the *Sullivan* rule unless they have published defamatory statements with "a high degree of awareness of their probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1974), *quoted in Lawrence v. Bauer*, 89 N.J. at 466.

The New Jersey Supreme Court, consistent with the broad free speech protections it recognizes, has taken a strict view of the showing required to satisfy plaintiffs' actual malice burden:

> The actual-malice standard is subjective. . . . Accordingly, the inquiry concerns [the defendant's] state of mind. To find actual malice, the factfinder must determine that the defendant in fact entertained serious doubts about the truth of the statement or that the defendant had a subjective awareness of the story's probable falsity.

Costello, 136 N.J. at 615; *accord Lawrence v. Bauer*, 89 N.J. at 467-68. (Pet. App. at 7).

Petitioners have presented no evidence that the newspaper defendants knew Naro was not a suspect or entertained serious doubts about whether he was a suspect. As the state court found, the newspaper defendants relied on comments of police officers (some specifically identified) and the factual circumstances surrounding the Horchak robbery. (Pet. App. at 8). Such reliance belies any claim of actual malice.

Petitioners complain that it was not clear from the newspaper defendants' article that Naro was just one of many suspects. Yet, *The Times*' article identifying Naro as a suspect quoted the police as stating that Naro "does fit the composite, but there are so many people that fit the composite that it doesn't mean a lot"; and that "the investigation of Naro was not a break in the case but just a lead that has to be checked." (DTa 66).

Naro's argument boils down to an assertion that although he was a suspect, he should not have been. Given the facts surrounding his earlier assault, there was considerable support for Naro's status as a suspect. However, whether or not he should have been a suspect does not alter the undisputed fact that he was a suspect.

With the uncontroverted statements of Hamilton Township Police Chief Taylor and Detective Captain Pizzullo that Naro was a suspect in the Szeker murder, and that this official position of the police department was communicated to *The Times*, no reasonable juror could conclude that *The Times* published the statement that Naro was a suspect with knowledge that it was false or in reckless disregard as to whether or not it was false. (DTa 127 to 129; DTa 132). The facts which provided the basis for the statement — the robbery with use of disguises and deadly weapons, Naro's likeness to the composite sketch of the Szeker killer and his ownership of a van — provided the rationale for Hamilton Township's position that Naro was a suspect in the Szeker murder.

The record is bereft of clear and convincing (or any) evidence that the newspaper defendants believed that the allegedly defamatory statement reported in the article was false. Nor is there a shred of proof that the newspaper defendants subjectively "entertained serious doubts as to the truth" of the information published about Naro. On the contrary, the article

was derived from information communicated by police officials, officials with whom *The Times*' reporter typically had day-to-day contact in the regular course of covering local events in Hamilton Township. Thus, this Court has no reason to disturb the state court's dismissal of petitioners' case for their failure to demonstrate the requisite actual malice.

IV.

THE STATE COURT PROPERLY RULED THAT PETITIONERS FAILED TO MEET THEIR CONSTITUTIONAL BURDEN OF PROVING ANY STATEMENTS WERE FALSE.

Plaintiffs have a constitutional burden under the First Amendment of proving that any allegedly defamatory statements published about them in *The Times* were, in reality, false. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768, 777-79 (1986); *Romaine v. Kallinger*, 109 N.J. 282, 289 (1988). This constitutional burden of proving falsity must be shouldered by all libel plaintiffs, including petitioners in this case. 475 U.S. at 777-78.

Petitioners cannot establish the falsity of the statement reported in the *The Times*' article that Naro was a "suspect" in the Szeker murder. The Hamilton Township Police have testified, both through Police Chief Taylor and Detective Captain Pizzullo, without dispute, that Naro was a suspect in the Township's investigation of the Szeker murder. (DTa 127 to 129; DTa 132).[9]

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9. "In assessing the [allegedly defamatory] language, the court must view the publication as a whole and consider particularly the context in which the statement appears." *Romaine v. Kallinger*, 109 N.J. at 290. The newspaper defendants did not state that Naro committed the murder or that he was the only suspect. The article in which the allegedly defamatory statement appears (Cont'd)

The Times set forth the official position of the Hamilton Township Police Department that Naro was a suspect. (DTa 127 to 129; DTa 132). As the state court found, the statement was true. (Pet. App. at 8). Therefore, it cannot be actionable and does not require this Court's review.

(Cont'd)
makes clear, through statements of Detective Pizzullo, that "the investigation of Naro was not a break in the case but just a lead that has to be checked," and that while Naro fit the composite, "there are so many people that fit the composite that it doesn't mean a lot." (DTa 66). In the article, *The Times* explained the factual basis for the police's suspicion of Naro: (1) Naro's use of weapons and a disguise in connection with the robbery; (2) Naro's resemblance to the composite sketch of the killer; (3) Naro's meeting the height of the killer; and (4) the fact that Naro's colleagues at work joked with him about fitting the killer's description and selling his van shortly after the murder. (DTa 65 to 66). These facts are not disputed. In a front page story the day after the article, *The Times* published Naro's attorney's denials of his client's culpability. (DTa 68 to 69). The facts that formed the basis of the suspicion of Naro — the robbery, the weapons, the disguises, the resemblance — were never denied.

CONCLUSION

For all of the foregoing reasons, defendants/respondents *The Times*, Peter Page and Richard Bilotti respectfully request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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